St. Marys Foundry Company *and* United Electrical, Radio and Machine Workers of America, and its Local 763 and St. Marys Foundry, Inc., Party in Interest. Case 8–CA–17369

August 7, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On December 24, 1990, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel, the Charging Party, the Party in Interest, and Lawrence Fisher, an individual,[1] filed exceptions and supporting briefs. The General Counsel, the Charging Party, and the Party in Interest filed answering briefs. The Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, St. Marys Foundry Company, St. Marys, Ohio, its officers, agents, successors, and assigns, and Party in interest, St. Marys Foundry, Inc., St. Marys, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Charles Z. Adamson, Esq., for the General Counsel.
Robin Alexander, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.
Robert J. Brown, Esq., of Dayton, Ohio, for Party in Interest.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Lima, Ohio, on July 25, 1990, based on a compliance specification issued on September 27, 1989, for purposes of resolving a controversy over the amounts of backpay due claimants under the terms of the Board's Decision and Order in *St. Mary's Foundry*, 284 NLRB 221 (1987), enfd. 860 F.2d 679 (6th Cir. 1988). The specification indicates a controversy concerning the number and identity of claimants. However these matters have now been resolved. It is undisputed that as alleged in the specification, there are 30 claimants, whose names are those set forth in the specification. However the amounts of backpay remain in dispute, the principal issue being the period of time for which backpay is due and owing.

Respondent St. Marys Foundry Company (Respondent) and Party in Interest St. Marys Foundry, Inc. (SMF Inc.) filed answers to the specification in which they raised certain affirmative defenses, which will be discussed. However Respondent did not appear at the hearing. All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. General Counsel, the Charging Party (the Union) and SMF Inc. each filed a brief.

On the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. DECISION AND ORDER IN THE UNFAIR LABOR PRACTICE PROCEEDING

Until about December 23, 1983, Respondent operated a facility at St. Marys, Ohio, where it was engaged in the manufacture of iron castings. The Union was the bargaining representative of Respondent's production and maintenance employees, who were covered by a collective-bargaining contract between the Union and Respondent. On December 23, 1983, Respondent closed its facility and terminated the unit employees. On December 28, 1983, Respondent and St. Marys Acquisition Corp. (Acquisition Corp.) entered into an agreement whereby Acquisition Corp. agreed to purchase the assets of Respondent and to assume certain of Respondent's liabilities and obligations, but not its obligations under the collective-bargaining contract. In February 1984, SMF Inc., a newly formed corporation, having completed the purchase,

[1] Lawrence Fisher is a former officer of the Respondent. Fisher objects to any implication in the judge's decision that Fisher is a proper party to this proceeding or that he is individually liable for backpay. We do not construe the judge's decision as making either of these findings.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge found, and we agree, that after July 25, 1986, when the bankruptcy court issued an order approving the trustee's report of no assets and closing the estate, the Respondent was a defunct corporation incapable of engaging in the collective bargaining contemplated by the Board's *Transmarine* remedy (*Transmarine Corp.*, 170 NLRB 389 (1968)) in the underlying unfair labor practice proceeding. 284 NLRB 221 (1987), enfd. 860 F.2d 679 (6th Cir. 1988). Accordingly, we adopt the judge's conclusion that the Respondent and the Party in Interest are jointly and severally liable only for the 2-week minimum backpay obligation under the *Transmarine* remedy.

The judge further found that he was bound by the compliance specification, which commenced the backpay period 5 days after the the issuance of the court of appeals' revised judgment. We note in this connection that the Board's decision issued after the critical July 25, 1986 date when the Respondent was no longer capable of engaging in collective bargaining. Therefore, the result in this case would remain the same even if backpay were calculated 5 days after the Board's decision instead of the court's decision.

We also find it unnecessary to adopt any implication in the judge's decision that the Union should have requested bargaining with the Chapter 7 trustee. Any such request would have been made prior to both the Board and court decisions and thus would have had no effect on the calculation of backpay under the *Transmarine* remedy.

Finally, we find it unnecessary to pass on what the judge himself described as his ''alternative findings.''

[1] Error in the transcript is noted and corrected.

commenced operations at Respondent's former facility, continuing the same type of business and work, serving the same customers in the same geographic area, using the same equipment, and employing 6 or 7 management and supervisory personnel and 26 or 27 employees who previously worked for Respondent. Larry Dine, Respondent's former president and plant manager, became majority stockholder, president, and general manager of SMF Inc. The Board found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to afford the Union an opportunity to bargain about the effects on the unit employees of ceasing its operations and closing the facility, by refusing to furnish the Union with certain information relating to the sale of the business, and by refusing to arbitrate certain grievances concerning termination and sale of the business. With respect to the failure and refusal to bargain, the Board found that SMF Inc. was the successor of Respondent for the purpose of remedying such unfair labor practices, under the principles of *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. 398 F. 2d 544 (5th Cir. 1968), and *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). General Counsel did not allege, and the Board did not find, that SMF Inc. was either an alter ego of Respondent or a successor of Respondent for the purpose of assuming Respondent's bargaining obligations, under the principles of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The Board, in pertinent part, ordered the following remedy:

> Respondent shall be ordered to bargain with the Union, on request, concerning the effects of closing its operations on its unit employees and jointly and severally with St. Marys, Inc. to pay backpay to Respondent's employees in the manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Thus, Respondent and St. Marys, Inc. jointly and severally shall pay the unit employees, who were employed at the time of the cessation of operations on 23 December 1983, amounts at the rates of their normal wages when last in Respondent's employ, from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to an agreement with the Union on those subjects pertaining to the effects of the closing of Respondent's operations on its unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of these employees exceed the amount the employee would have earned as wages from 23 December 1983, the date on which Respondent ceased its operations, to the time the employee secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. . . . [backpay with interest] Further, to protect the rights of St. Marys, Inc., which will be liable with Respondent for backpay arising from the bargaining over the effects on the unit employees of closing Respondent's facility, it shall be notified by Respondent of such effects bargaining and at its option have the right to participate in that bargaining between the Respondent and the Union.

The Board further explained as follows:

> *Golden State* holds that if the purchaser does not hire a majority of the predecessor's employees and is thus not a successor within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), it ''will not be bound by an outstanding order to bargain issued by the Board against the predecessor nor by any order tied to the continuance of the bargaining agent in the unit involved.'' *Golden State*, supra, 414 U.S. at 184 fn. 6. We do not believe our order here runs afoul of that prohibition. Only the Respondent is ordered to bargain over the effects of its shutdown; SMF, Inc. is made jointly and severally liable only for the backpay that would be owed under the formula set out in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). This purely monetary obligation does not ''bind'' SMF, Inc. to the order to bargain nor is it ''tied to the continuance'' of the Union as a bargaining agent in SMF, Inc.'s operation. Cf. *Bellingham Frozen Foods v. NLRB*, supra, 626 F. 2d at 681. Should the Respondent's bargaining over effects obligate the Respondent to actions other than monetary relief, SMF, Inc. would not be bound.

II. SEQUENCE OF EVENTS

A. *The Unfair Labor Practice and Bankruptcy Proceedings, Union Requests for Bargaining, and Contacts Leading to the March 8, 1989 Meeting*

Administrative Law Judge Thomas D. Johnston conducted a hearing in the unfair labor practice case in July and October 1985. On December 16, 1985, Judge Johnston issued his decision and recommended Order, which was received by the Union on December 19, 1985. Judge Johnston's recommended remedy and Order provided for joint and several payment by Respondent and SMF Inc. in accordance with *Transmarine*, as set forth above, including the condition that the Union ''request bargaining within 5 days of this decision.'' By mailgram dated Monday, December 23, 1985, to Respondent Vice President Lawrence Fischer, with a copy to SMF Inc. President Dine, the Union requested ''bargaining in accord with Decision of ALJ,'' and asked for a convenient date after January 1, 1986. (After the December 23 closure, Fischer functioned as Respondent's chief operating officer.) Fischer replied by letter that he received the mailgram on December 24, 1985, that Respondent filed a bankruptcy petition with the Federal court in Cleveland, and he was no longer an officer or agent of Respondent, and he would not make any arrangements or decisions concerning any meetings. However by letter dated February 3, 1986, to the Region's compliance officer, Attorney James Carolin stated that he represented the Company. Carolin asserted that the backpay obligation, if any, was limited to a 2-week period, because the Union did not request bargaining within 5 days of the judge's decision. Carolin stated that Respondent, while not admitting a duty to bargain, stood ready to do so on the Union's request. By letter dated February 5, the compliance

officer stated that in the Region's view the Union's request was timely, because the 5-day deadline allowed an additional 3 days for service. He asserted that Respondent should promptly respond to the Union's request. By letter dated February 7, Carolin again asserted that Respondent was willing to bargain with the Union, without admitting a duty to do so, but preferred to hear from the Union. Carolin sent copies of his correspondence to the Union's attorney. SMF Inc. and General Counsel filed exceptions to Judge Johnston's decision, and no bargaining took place at this time. On June 12, 1987, the Board issued its Decision and Order, substantially affirming Judge Johnston's decision and adopting his recommended Order. The Board found it unnecessary to decide whether Respondent gave timely notice of its decision to close (as distinguished from the obligation to bargain), and revised the interest remedy to conform with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), but in other respects approved the recommended remedy and adopted the recommended Order, including the condition that ''the Union request bargaining within 5 days of this decision.''

In the meantime, on December 18, 1985, Respondent filed a voluntary Chapter 7 bankruptcy petition with the United States Bankruptcy Court in Cleveland, Ohio. On December 19, 1985, the court appointed an interim trustee. On January 24, 1986, the Board filed its claim, and on April 10, 1986, the Union filed a claim for damages. On January 24, 1986, Judge Johnston's decision was filed with the court. On February 5, 1986, the trustee filed a report of no distribution. On July 25, 1986, the bankruptcy court issued an Order approving trustee's report of no assets and closing estate. The evidence fails to indicate that Respondent corporation was ever dissolved in accordance with the laws of its State of incorporation.

The Union received the Board's Decision and Order on June 17, 1987. By mailgrams dated Tuesday, June 23, 1987, to Fischer and Dine, the Union requested bargaining ''in accord with the Board's Decision,'' and communication for a mutually agreeable arrangement. The mailgrams were received respectively by Dine on June 23, 1987, and Fischer on June 24, 1987. By letter dated July 14, 1987, Attorney Carolin informed then Director of Organization John Hovis that Respondent was ''willing to bargain collectively with [the Union] with respect to the effects on the unit employees of the cessation of operations and closing of the facility.'' Carolin requested Hovis to contact him to make the necessary arrangements. However by letter dated August 27, 1987, to then Union International Representative Donald Agler, Carolin asserted there were no proceeds from the sale because SMF Inc. agreed to assume liabilities in consideration of the asset values, and that Respondent was declining to meet with the Union, because the Board sought judicial enforcement of its decision.

On November 3, 1988, the United States Court of Appeals for the Sixth Circuit issued its opinion and judgment enforcing the Board's Order. This opinion and judgment, but not subsequent court papers, were served on the Union. The court issued its mandate on November 28, 1988. However by letter dated November 14, 1988, the Board requested the court to revise its judgment to delete reference to failure to give timely notice, i.e. to reflect the Board's Decision. The court granted the Board's request, withdrew its mandate and issued a revised judgment on December 30, 1988, and a new mandate on January 23, 1989. The Union received the new mandate and revised judgment on March 15, 1989. Meanwhile, by letter dated December 12, 1988, International Representative Agler informed SMF Inc. Attorney Robert Brown that he was available to meet in December 1988 and January 1989 to negotiate a settlement concerning the unfair labor practice case. Attorney Allen Grotke testified in sum as follows: From July 1988 to March 25, 1989, he was associated with the law firm which represented Respondent. About February 1, 1989, Attorney Carolin requested him to handle the matter. Grotke reviewed the case file, and learned that Respondent went through bankruptcy proceedings, had no assets, and ''there was no Company.'' Grotke also contacted the Board's compliance officer (SMF Inc. offered to prove, and correspondence from the compliance officer so indicates, that the officer threatened contempt proceedings unless Respondent and SMF Inc. undertook to negotiate a settlement with the Union). On February 1, Grotke spoke to Agler about setting up a meeting. Agler said he did not know the issues. Grotke asked for a list of issues before they set up a meeting. Agler said he would provide a list, and get back to Grotke by February 3 (Grotke had to give the compliance officer a status report by February 13). Agler never furnished the list, and did not get back to Grotke by February 3. Grotke tried unsuccessfully several times to contact Agler, who eventually called back on February 10 or 13. They discussed Respondent's status. Grotke said Respondent was bankrupt and had no assets. Agler questioned why then they were meeting. A few days later (mid-February) Agler or Union International President John Hovis called to inform Grotke that a meeting would be held on March 8, 1989, at 10:30 a.m. at the Holiday Inn in Wapakoneta, Ohio. Although Agler and Hovis were presented as General Counsel witnesses, they did not dispute Grotke's testimony concerning the contacts leading to the March 8 meeting. I credit Grotke's testimony in this regard.

B. *The March 8 Meeting*

The parties met as agreed on March 8, 1989, at the Holiday Inn in Wapakoneta. They met in two sessions, from 10:30 a.m. to about 12:45 p.m. and from 2 p.m. to about 4:30 p.m., with an interim luncheon recess. International President Hovis and International Representative Agler, accompanied by five individual claimants, including Local President Jerry McEldowney, represented the Union. Attorney Grotke represented Respondent, or more accurately, the interests of Lawrence Fischer. Attorney Brown represented SMF Inc. Hovis and Agler testified as General Counsel witnesses and Grotke and Brown as witnesses for SMF Inc.

Hovis, General Counsel's principal witness, testified in sum as follows: When they convened, Grotke said he was not sure why they were there. He said Respondent filed bankruptcy, had no assets, and he was there to comply with the court decision. He did not know how many employees were involved or their rates of pay at the time of plant closure. Hovis said the Union was there to bargain over the effects of closure and possible settlement of the unfair labor practice case. They discussed calculation of backpay, but never agreed on this. Brown said the Union misunderstood the Board's remedy. Hovis suggested they recess while Hovis called the Board's compliance officer. This was done. When Hovis returned, he explained the compliance officer's

understanding of the remedy. The Board agent calculated that backpay for an 8-week period with interest could range from $125,000 to $170,000, and that backpay for the minimum 2-week period under *Transmarine* would amount to $36,500. Brown said this was incorrect. At this point the parties recessed for lunch. When they resumed, Grotke said that although Respondent filed bankruptcy and had no assets, he was authorized to make a proposal. Grotke proposed settlement for 80 percent of the $32,500 figure or alternatively (if the Region's calculations were incorrect), 2 weeks' pay for each of the 30 or 31 laid-off unit employees, at their rate of pay of $9 per hour, with interest if the total was less than the Region's calculation. Hovis said this was grossly unfair. Grotke said he did not know how to pay for the proposal, and did not know whether he himself would be paid. Brown said that SMF Inc. would guarantee payment. Grotke said there was an issue as to whether the Union made a timely request for bargaining, and he was not sure Respondent owed anything. The Union caucused. At some point Hovis, Grotke, Brown, and McEldowney held a side bar discussion. However Hovis could not recall what they said. When they returned to the table, Hovis proceeded to recite the Union's claims. Hovis calculated Respondent was liable for backpay at about $100,000, underfunding of the pension plan resulting in reduced pensions, for a loss of about $250,000, loss of life insurance benefits for two employees who died, amounting to $40,000, hospital bills of at least $70,000 for employees and their dependents who lost their health insurance, loss of vacation pay, and failure to arbitrate grievances (Hovis proposed to settle the grievances for $3000). Hovis also proposed 4 weeks severance pay, amounting to $45,000. Hovis proposed a total package settlement of $170,000. Grotke said the proposal was out of the question, the Union was well aware Respondent had no money and the Union should reconsider his proposal. He said the pension plan was terminated and out of his hands. (In the unfair labor practice proceeding, the Board found that Respondent did not violate the Act by unilaterally terminating the pension plan on October 31, 1984, after the expiration date of its collective-bargaining contract.) Grotke said that it was too bad that the employees lost their life and health and welfare insurance, but the Union had his proposal. At about 4:10 p.m. Grotke said he considered the parties to be at impasse. Hovis said there was no impasse, the Union was prepared to bargain and amend its proposal, and ''They should make a counterproposal.'' Grotke said the Board and its compliance officer created the problem by not conveying the actual remedy, and the Union did not understand what the case involved. Hovis suggested that Grotke talk to the Board's compliance officer, and then the parties could meet again. The meeting ended at about 4:30 p.m. They did not meet again, although Hovis, Grotke and Brown each presented their positions in writing to the Board's compliance officer. International Representative Agler testified in sum as follows: At the morning session they discussed the enforcement decision, but could not agree on its meaning. Agler himself did not understand the decision, and the ''discussion left me in bad shape.'' They discussed the backpay period and what was owed. At this point Agler left the meeting. After Hovis talked to the compliance officer, Agler returned to the meeting. Hovis reported his conversation with the compliance officer. No other issues were discussed at the morning session. At the afternoon session Grotke made his proposal, Brown said SMF Inc would guarantee the proposal, and Hovis said the proposal was ''awful short.'' The Union caucused. After they returned Hovis explained the Union's claims, and asserted that in light of these claims, his proposal of $170,000 was a fair offer. Grotke was upset about the figure, but ''I can't remember exactly what he said.'' Shortly after 4 p.m. Grotke said he thought they had reached an impasse. Hovis disagreed. He said the Union made a proposal and had room to move, and could be ready to move. He said he thought Grotke did not understand what was involved, and should talk to the compliance officer, and then they could meet again. The parties restated their positions in this regard, but there was no agreement, and they adjourned.

Attorney Grotke, SMF Inc.'s principal witness, testified in sum as follows: He acted as chief spokesman. He said they were there under pressure, because they were threatened with contempt, and told they had better meet and ''better talk money.'' Grotke said he felt awkward acting as representative of Respondent, meaning Fischer. Hovis said the Union understood. The Union raised issues concerning computation and period of backpay, severance pay, grievances, pension plan, medical benefits and life insurance (referring to two deceased employees). The parties were confused about computation and running of backpay. Hovis said the amount due and owing ranged from a high of $170,000 to a low of $110–125,000. Brown and Grotke were amazed. Grotke said Respondent had no assets, and the Union said they were well aware of that. Grotke said he was not sure he would be paid, as Fischer told him there was no longer any (Respondent) Company. At the luncheon recess Brown and Grotke consulted with SMF Inc. President Dine. At the afternoon session they proposed to pay 80 percent of the $36,500 amount, i.e., the 2-week minimum as calculated by the compliance officer or an amount based on the parties' calculation of 2 weeks pay with interest. Brown said SMF Inc. would guarantee the offer. The parties again discussed the matters they discussed in the morning, and there was continued confusion over calculation of severance pay or backpay. The Union said the compliance officer said they were entitled to $170,000. Hovis, Grotke, Brown and McEldowney then held their side bar conference. Grotke and Brown said they were there to negotiate in good faith, although they questioned whether they owed any money, because they believed that the Union did not give timely notice in accordance with the Board decision. They restated their offer, and returned to the table. The Union again asserted that the compliance officer told them they were entitled to $170,000, and stated that they would be doing an injustice to the employees if they did not go for that full amount. Grotke did not respond or inquire into the specifics of the Union's claims. He said they were apparently at impasse, and Hovis agreed. Hovis said he would discuss the meeting with the Union's attorneys and get back to Grotke and Brown. The meeting broke up at about 4:30 p.m., but the Union never got back to them. Attorney Brown testified in sum as follows: He attended the meeting as SFM Inc.'s representative, at Grotke's request, in order to comply with the court order, because the Board was threatening Respondent with contempt. Brown also attended the meeting for informational purposes, and because the court order provided for joint and several liability. Grotke said Respondent was bankrupt, had no assets and could not pay any-

thing. The parties discussed calculation of backpay. There was confusion. Grotke and Brown said they could not understand the compliance officer's minimum figure of $36,500, and questioned its accuracy. His calculation was explained after Hovis called the compliance officer. Hovis then presented the Union's claims, item by item, with amounts. At the afternoon session Grotke and Brown presented their proposal, with Brown stating that SMF Inc. would guarantee the amount. Later the Union presented its proposal to settle for $170,000, saying that ''we can't take anything less.'' Grotke said that Respondent could not pay anything, would leave its offer on the table, and if the Union would not take less than $170,000, they would not offer anything more, and therefore it appeared the parties were at impasse. Hovis said yes, and the meeting broke up.

The testimony of the witnesses presents questions of fact as to (1) whether the Union discussed the specifics of its claim both at the morning and afternoon session, (2) whether the Union indicated that it would not take less than its proposal to settle for $170,000, (3) whether the Union agreed they were at impasse, and (4) whether Hovis said he would get back to Grotke and Brown after talking to the Union's attorneys. In other respects I find that the testimony of the witnesses together substantially reflects what transpired at the meeting. Agler substantially corroborated portions of Hovis' testimony, and Brown substantially corroborated portions of Grotke's testimony. The corroborative witnesses were not cross-examined. As between General Counsel's and SMF Inc.'s witnesses, I credit the testimony of Grotke and Brown where it conflicts with that of Hovis and Agler. The testimony of Grotke and Brown demonstrated a clearer and more specific recollection of the meeting than that of the union officials. The testimony of Agler was particularly weak. Agler frankly admitted that he did not understand the discussion at the morning session, he was not present during part of the session (when there is an issue of whether the Union discussed its specific claims), he could not remember Grotke's response to the Union's proposal, and he testified that Hovis said that Grotke did not understand what was involved, although Hovis testified that Grotke made this remark to him. Grotke, although more specific and accurate in his testimony, testified that he could not recall what was said at the side bar discussion. I do not agree with General Counsel's argument (Br. 8–9), that it is unlikely that Hovis would agree with Grotke that the parties were at impasse. Hovis believed, on the basis of the compliance officer's calculations, that the claimants were entitled to $170,000 from Respondent and SMF Inc. as a matter of law under the *Transmarine* remedy, regardless of what transpired at the bargaining table. He knew that it was not realistic to expect more, and that further talk was useless. Therefore he felt free and in full confidence to agree that the parties had reached an impasse.

C. *Analysis, Concluding Findings, and Conclusions of Law*

As indicated, Judge Johnston's recommended Order, the order as adopted by the Board, and the enforcement judgment, each adopt by reference the recommended *Transmarine* remedy, including commencement of backpay ''from 5 days after the date of this decision.'' General Counsel takes the position (Br. 3–4), that the backpay period commenced to run on January 5, 1989, i.e., 5 days after issuance of the court's revised judgment. The Union contends (Br. 3), that the potential backpay period began to run on December 21, 1985, i.e., 5 days after Judge Johnston's decision. I have no authority to expand on the compliance specification. I find that the specification represents the limits of potential backpay, and therefore the backpay period cannot be deemed to commence at an earlier date than that pleaded by General Counsel. I find, as asserted by General Counsel, that the backpay period commences on January 5, 1989.

The next question presented is whether and if so at what point backpay should be tolled. General Counsel and the Union contend that none of the *Transmarine* conditions have been met, and therefore the backpay period continues to run. SMF Inc. contends that all *Transmarine* conditions have been met, and for this and other reasons, SMF Inc. and Respondent are jointly and severally liable for no more than 2 weeks backpay. SMF Inc. and Respondent assert in sum in their answers to the specification that the Union did not make a timely request for bargaining, the Union failed to commence negotiations within 5 days of Respondent's notice of its desire to bargain, the Union failed to bargain in good faith, the parties reached a bona fide impasse in bargaining, liability and any bargaining obligation was voided by Respondent's bankruptcy, Respondent does not exist, the actions of the Board and its compliance officer were responsible for any alleged failure of compliance (I rejected this defense at the hearing), SMF Inc. and Respondent complied with the Board's Order and the court's judgment, the calculation of backpay is erroneous and contrary to law, and no contributions to the terminated pension plan are mandated.[2]

I find that Respondent and SMF Inc. are jointly and severally liable for the minimum backpay obligation under the *Transmarine* remedy, namely, to pay, with interest, the wages which the claimants would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. I make this finding because a corpse (in this case a defunct corporation), is incapable of bargaining. From December 18, 1985, when Respondent filed its Chapter 7 petition, until July 25, 1986, when the estate was closed, only the interim trustee could bargain on Respondent's behalf. However the Union never requested such bargaining. Thereafter Respondent ceased to exist, except as a piece of paper on file in its state of incorporation. Respondent conducted no business, had no assets, and had no officers who could act on its behalf. Indeed the parties recognized as much when they met on March 8, 1989. I credit the assertions of Attorneys Grotke and Brown that they met with the Union because they and their clients SMF Inc. and Respondent (meaning Lawrence Fischer) were threatened with contempt proceedings and SMF Inc. with continuing liability, if they did not meet with the Union. I find that Respondent and SMF Inc. did not waive their rights or positions by meeting

[2] The Union (Br. 5) moves for summary judgment, on the ground that Respondent's answer fails to comply with Sec. 102.56(a) of the Board's Rules. However SMF Inc. filed an answer to the compliance specification, and its form is not questioned by General Counsel or the Union. Therefore the allegations of the specification are in issue. Moreover the Union's motion begs the question. There is an issue in this case as to whether Respondent corporation is an entity which is even capable of filing an answer in the form specified by Sec. 102.56(a). The Union's motion is denied. As Respondent's answer affirmatively alleges that the Union failed to commence negotiations within 5 days of Respondent's notice of its desire to bargain, I find that the matter is properly in litigation.

with the Union. International President Hovis tipped the Union's hand when he testified that he told Grotke and Brown that ''they,'' meaning both of them, should make a counterproposal. Hovis knew Respondent had no assets and was defunct. He sought to enmesh SMF Inc. into the bargaining, although it had no obligation to bargain with the Union, holding over its head the threat of continuing liability if SMF Inc. and Respondent did not come forward with a better offer.

This is an appropriate proceeding for application of the principle set forth in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942), that bona fide discontinuance and a true change of ownership of a business, may operate to terminate nonmonetary obligations (in that case, reinstatement) created by the Board's Order. See also *Johnson v. England*, 356 F.2d 44, 49 (9th Cir. 1966). The matter is properly decided, as here, in compliance or contempt proceedings. *Ahrens Aircraft v. NLRB*, 703 F.2d 23 (1st Cir. 1983); *NLRB v. West Coast Casket Co.*, 469 F.2d 871, 873 (9th Cir. 1972). Reliance by General Counsel and the Union on *NLRB v. Better Building Supply Corp.*, 837 F.2d 377 (9th Cir. 1987), and *In re: Goodman*, 873 F.2d 598 (2d Cir. 1989), is misplaced. Those decisions stand for the principle that a Chapter 7 bankruptcy proceeding does not operate to dissolve the debtor corporation or discharge its debts. In each case, there was either an alleged or actual alter ego which stood liable for the debtor corporation's backpay obligations. I have no problem with finding that as Respondent Corporation was never dissolved, its backpay obligations were not discharged by the bankruptcy proceeding. The question here presented, which was not presented in Better Building Supply or Goodman, is whether a defunct corporation is capable of engaging in collective bargaining. Here there is no alter ego. The Board has determined that SMF Inc. is a successor only for the purpose of remedying Respondent's obligations under the *Transmarine* formula and has no obligation to bargain with the Union. As Respondent is incapable of engaging in collective bargaining, it follows that Respondent and SMF Inc. are jointly and severally liable for the minimum remedy of 2 weeks' backpay.

As this case presents issues of first impression, I am making certain alternative findings. General Counsel contends (Br. 8) that the Union made a timely request for bargaining on December 23, 1985, because the Board's Rules at that time provided an additional 3 days for service time. I agree that the Union made a timely request for bargaining, but for a different reason. Both the Federal Rules of Civil Procedure and the Board's Rules provide that in computing prescribed or allowed times, the day of the act, event or default from which the designated period begins to run shall not be included. The rules also provide that the last day of the period shall be counted unless a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. Both rules further provide that when the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. Applying these rules to the present case, the Union's request for bargaining on Monday, December 23, 1985, was timely, because it came within 5 days of Judge Johnston's decision (issued on December 16, 1985), as defined by the Rules. As Judge Johnston's recommended Order, the Board's Order and the court's judgment all incorporated by reference the phrase ''the failure of the Union to request bargaining within 5 days of this decision,'' I find that the Union's request would be timely if made within 5 days (as defined by the rules) of issuance of any of the three orders. Therefore the Union's request of December 12, 1988, for bargaining was also timely, because the Union made that request after issuance of the court's opinion and initial judgment, but prior to issuance of the revised judgment and mandate. I further find that each of the Union's requests should be regarded as continuing in nature. Cf. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 2241 (1987). See also *Armour & Co.*, 280 NLRB 824, 829 (1986). To do otherwise (assuming a bargaining obligation) would be in effect to reward the wrongdoer by forcing the union to renew its demand every time the respondent failed or refused to honor that demand. As the Supreme court held in the comparable situation in *Fall River Dyeing*,'' it makes no sense to require the union repeatedly to renew its bargaining demand . . . when with little trouble the employer can regard a previous demand as a continuing one.''[3]

However I find that the Union failed to commence bargaining within 5 days of Attorney Grotke's notice of his desire to bargain with the Union. Therefore, assuming there were a bargaining obligation, backpay would be tolled as of February 8, 1989, 7 days after Grotke requested a meeting. Grotke testified without contradiction that he contacted Agler about a meeting on February 1, that Agler professed he did not know the issues, but promised to get back to Grotke by February 3, but did not until February 10, and never gave Grotke the list of issues. Agler failed to explain why they could not meet until March 8. In the meantime, assuming a bargaining obligation, backpay would be running. I find that assuming bargaining obligation, backpay would be tolled as of February 8, 1989.

Assuming that Respondent were obligated to bargain with the Union, and further assuming that the Union made a timely request for bargaining and commenced negotiations in a timely manner, I would find that the parties bargained in good faith to an impasse on March 8, 1989. Therefore if not tolled earlier, backpay would be tolled as of that date. Financial inability does not excuse a failure or refusal to bargain. However financial inability is a permissible position in negotiations, and a proper subject for bargaining. *Hamady Bros. Food Markets*, 275 NLRB 1335 (1985); *Commercial Printing Co.*, 99 NLRB 469, 475–478 (1952). Here, the parties held only one meeting. In view of the positions of the parties and the situation of Respondent, any further discussion probably would have been futile. Respondent was a defunct corporation, with no assets, and the Union knew this to be true. The Union never questioned or asked for proof of Grotke's assertions. Respondent, or someone on its behalf, could offer only as much money as SMF Inc. would guarantee, and all parties knew this. SMF Inc. believed that it was not obligated to pay more than the minimum *Transmarine* remedy of 2 weeks backpay. The Union believed, on the basis of the compliance officer's calculations, that the claimants were entitled to a total of $170,000, as a matter of law. SMF Inc., which had no obligation to bargain, was unwilling to move from its position. In these circumstances, it would have been meaning-

[3] The Supreme Court distinguished a situation in which the union's demand was based on a matter peculiarly within the union's knowledge. Such is not the situation in the present case.

less and futile for Grotke to go through the motions of discussing or questioning the particulars of the Union's claims. The Union knew this. The Union sought to enmesh SMF Inc. in the bargaining, trying to get SMF Inc. to make an offer. When its efforts proved unsuccessful, and neither the Union nor SMF Inc. was willing to move from their positions, Grotke and Hovis recognized and agreed that there was an impasse. The matter could be resolved only through settlement or litigation of the Board compliance proceeding. Indeed, in the view of the parties, bargaining over the effects of the closing of Respondent's operations, was inseparable from resolution of backpay obligations under the Board's Order.

Turning to the particulars of the compliance specification, the Board's remedy provides for payment to the unit employees of ''amounts at the rates of their normal wages when last in Respondent's employ.'' The remedy, and consequently the Board's Order, makes no provision for compensation for lost benefits. Deferred, contingent compensation, such as health, welfare and pension benefits, which employees are entitled to receive in addition to their wages, constitute ''fringe benefits'' rather than wages. *Teamsters Local 449 (Universal Liquor)*, 265 NLRB 1539, 1544, 1555 (1982), reversed on other grounds 728 F.2d 80 (2d Cir. 1984). Therefore the claims for loss of such benefits are disallowed.

The Region's present compliance officer testified that the amounts set forth for the fourth quarter of 1983 reflected 1 week's wages. Therefore backpay shall be calculated at double the amount of gross backpay for the fourth quarter of 1983.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent St. Marys Foundry Company and St. Marys Foundry Inc., their officers, agents, representatives, successors, and assigns, shall jointly and severally make whole the following named employees for their loss of wages, by paying each of them the amount set forth below opposite their name, plus interest thereon accrued to the date of payment and computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[5] less tax withholdings required by Federal and state laws:

Gerald Berry	$770
Arthur R. Brewer	778
Rafe Chilcoat Sr.	770
Randy Chilcoat	840
Gilbert Cotrell	840
Lester F. Cotterman	816
Frank W. Cramer	848
Lawrence W. Davis	840
Danny Dorsten	770
Ernest England	736
Eldon Eshelman	770
Forrest Goodwin	822
Charles Greenawalt	840
Billy Hall	776
Dale Hall	770
John Hall	800
Paul Jones	790
estate of Vernon Koeper	840
Jackie Makley	766
Jerry McEldowney	800
Todd Miller	806
Verl Muter	844
Thomas Pruitt	752
Fred Reedy	872
Orin Roettger	846
Leon Schoenlein	774
Richard Schoenlein	778
Charles Slone	818
Rollen Taylor	840
James Walter	820
	$24,132

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977).